IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CAROL A. MONTGOMERY — PLAINTIFF

V. — CIVIL ACTION NO. 1:98-cv-228-B-D

MISSISSIPPI STATE UNIVERSITY,
ED MONTGOMERY AND CHARLIE SANDERS
IN THEIR INDIVIDUAL CAPACITIES — DEFENDANT

MEMORANDUM OPINION

This cause comes before the court on the Mississippi State University's motion to dismiss and/or for summary judgment, Ed Montgomery and Charlie Sanders' separate motions for summary judgment, Ed Montgomery's motion for qualified immunity, and Charlie Sanders' second motion for summary judgment. Upon due consideration of the parties' memoranda and exhibits, the court is ready to rule.

FACTS

The plaintiff began working for Mississippi State University ("MSU") in 1991, and since 1995, she was employed in the housing department. The plaintiff claims to have suffered from an ongoing and pervasive atmosphere of sexual harassment in her workplace, most of which was initiated by her immediate supervisor, Ed Montgomery, and by a co-worker, Charlie Sanders. The plaintiff alleges that Ed Montgomery's sexual harassment included the following: comments to the plaintiff about going away to the casinos; displaying pornographic web pages on his computer; repeatedly touching her in inappropriate ways including full frontal hugs, pressing his body against hers, putting his hands on her shoulder, and patting her "on the rump;" and presenting her with a copy of the Kama Sutra. The plaintiff alleges that Charlie Sanders' sexual harassment included the following: comments about his personal life; asking her to accompany him to his condo; making obscene gestures of grabbing his crotch; placing candy in his mouth, sticking out his tongue and rolling it around his lips when propositioning the plaintiff; describing a sexual dream he had about her; staring at her chest; and asking her to go skinny dipping with him.

In December 1996, MSU conducted an investigation into a separate allegation of sexual discrimination. During an interview of the plaintiff, she stated that she was not subjected to any form of sexual harassment by either Ed Montgomery or Charlie Sanders. The plaintiff also stated that she was given a copy of MSU's policies and procedures regarding sexual harassment. Also, in December 1996, the plaintiff attended a workshop conducted by MSU on sexual harassment awareness which was conducted by Dr. David Torres, MSU's Affirmative Action/Equal Opportunity Officer.

In early June 1997, the plaintiff complained to Dr. Ruby, Vice President of Student Affairs, about Sander's behavior of sexual harassment. On June 2, 1997, the plaintiff was referred to Dr. Torres by Gerald Tice, Associate Vice President for Student Affairs. Shortly thereafter, the plaintiff complained about the actions of Montgomery to Dr. Torres. On June 23, 1997, the plaintiff began counseling with Dr. Jeane Lee, a licensed professional counselor employed by MSU, and during these sessions, Dr. Lee advised the plaintiff not to return to work.

The plaintiff was placed on administrative leave beginning June 25, 1997, at which time, she was hospitalized due to migraine headaches. The plaintiff was put on Family and Medical Leave on July 11, 1997 until October 3, 1997. On October 4, 1997, Dr. Tice placed her on an approved unpaid leave of absence. On November 11, 1997, the defendants claim that Dr. Tice mailed the plaintiff a letter inquiring about her intentions to return to work. In this letter, the plaintiff was informed that if forms were not completed and returned by December 1, 1997, it would be assumed that she did not intend to return to work and would be terminated. The plaintiff did not respond to this letter, and by letter dated December 18, 1997, she was informed of her termination effective December 22, 1997.

The plaintiff brings this cause claiming Montgomery and Sanders sexual harassment coupled with MSU's failure to take meaningful action to end the alleged harassment caused her to suffer injuries which resulted in her inability to work. The plaintiff also brings claims of constructive discharge and retaliation against MSU. Upon investigation into the plaintiff's claim of sexual

discrimination, Sanders resigned in June of 1997, and Montgomery announced his retirement which became effective after the plaintiff's employment was terminated.

LAW

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986) ("the burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

A. Actionable Discrimination

In order to be actionable under the statute, a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so. Indest v. Freeman Decorating, Inc., 164 F.3d 258, 263 (5th Cir. 1999). Whether an environment meets this standard depends on "'all the circumstances, including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" Butler v. Ysleta Indep. Sch. Dist., 161 F.3d 263,

269 (5th Cir. 1999). It is the opinion of the court that upon taking the facts as alleged by the plaintiff as true, a genuine issue of material fact exists as to whether the plaintiff's employment environment was both objectively and subjectively offensive.

B. Constructive Discharge

To prove constructive discharge, an employee must offer evidence that the employer made the employee's working conditions so intolerable that a reasonable employee would feel compelled to resign. Brown v. Bunge Corp., 207 F.3d 776, 782 (5th Cir. 2000). Stated more simply, the plaintiff's resignation must have been reasonable under all of the circumstances. Whether a reasonable employee would feel compelled to resign depends on the facts of each case, but we consider the following factors relevant, singly or in combination: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement [or continued employment on terms less favorable than the employee's former status]. Barrow v. New Orleans Steamship Ass'n, 10 F.3d 292, 297 (5th Cir.1994).

Upon examination of these factors, it is evident that none of the constructive discharge factors are present. The only factor that could possibly have been present is the badgering, harassment or humiliation by the employer calculated to encourage the employee's resignation. However, it is the opinion of the court that the facts presented do not raise a genuine issue of material fact as to constructive discharge. The present circumstance does not constitute constructive discharge when two inquiries as to whether the plaintiff was going to return to work were not responded to by the plaintiff. Further, the request by the plaintiff's attorney that the plaintiff be reinstated in her position indicates a willingness and determination to return to her employment. Therefore, the court cannot conclude that the plaintiff's working conditions were so intolerable that a reasonable employee would have felt compelled to resign, and the claim for constructive discharge should be dismissed.

C. The Affirmative Defense

When no tangible employment action is taken, such as in a hostile environment sexual harassment action, a defending employer may raise an affirmative defense to liability or damages under Title VII, and that defense comprises two necessary elements: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Argullo v. Conoco, Inc., 207 F.3d 803, 809 (5th Cir. 2000). It is the opinion of the court that upon taking the facts as alleged by the plaintiff as true, a genuine issue of material fact exists as to whether MSU exercised reasonable care to prevent and correct the alleged sexual harassment and whether the plaintiff unreasonably failed to take advantage of preventive or corrective measures in its attempts to inform the plaintiff of measures to use in response to sexual harassment.

D. Retaliation

To state a claim for retaliation, a plaintiff must prove that: (1) he engaged in protected activity pursuant to Title VII; (2) he suffered an adverse employment action; and (3) a causal nexus exists between the protected activity and the adverse employment action. Haynes v. Pennzoil Co., 207 F.3d 296, 299 (5th Cir. 2000). "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon these ultimate decisions." Watts v. Kroger Co., 170 F.3d 505, 511 (5th Cir. 1999). The burden-shifting structure applicable to Title VII disparate treatment cases, as set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), is applicable to Title VII unlawful retaliation cases. Therefore, once the plaintiff establishes a prima facie case, the burden of production shifts to the defendant to articulate a legitimate, non- retaliatory reason for the adverse employment action. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). If the defendant introduces evidence which, if true, would permit the conclusion that the adverse employment action was nondiscriminatory, the focus shifts to the ultimate question of whether the defendant unlawfully

retaliated against the plaintiff. McDonnell Douglas Corp., 411 U.S. at 802-04.

The memorandum filed by MSU argues that the plaintiff failed to comply with the filing deadline of the Equal Employment Opportunities Commission by not giving notice of the charge of retaliation against MSU, and therefore the retaliation claim is not available to the plaintiff. The plaintiff replies to this assertion by stating that the court has ancillary jurisdiction over the retaliation claim since an initial Title VII discrimination claim from the same charge is properly before the court. MSU does not respond to this assertion in their rebuttal memorandum. Therefore, it is the opinion of the court that jurisdiction over the plaintiff's retaliation claim is proper. See Carter v. South Central Bell, 912 F.2d 832, 841 (5th Cir. 1990).

E. Ed Montgomery and Charlie Sanders

The defendants, Ed Montgomery and Charlie Sanders, both moved in separate motions for summary judgment on the grounds that there is no individual liability under Title VIII, the plaintiff's charge of discrimination did not include the individual defendants, and that the discrimination claim was not filed timely. In the plaintiffs opposition to summary judgment, she stated that her cause was not under Title VII, but under 42 U.S.C. § 1983, and as such, there was no Title VII claim as to the individual defendants and the defendants' response of the claim being time barred was inapplicable. In her memorandum brief in opposition to the motions for summary judgment filed by Ed Montgomery and Charlie Sanders, the plaintiff states that the complaint "specifically states that the actions against the individual Defendants are . . . authorized by 42 U.S.C. § 1983." However, in the complaint, the plaintiff alleged the following as her basis for jurisdiction in this court:

> This court has federal question jurisdiction under 28 U.S.C. § 1331 and jurisdiction under Title VII of the Civil Rights Act of 1964 42 U.S.C. § 2000e, et. Seq. As amended by the Civil Rights Act of 1991. Also this action against individual defendant is based on the equal protection claims of the United States Constitution Amendment Fourteen and is authorized by 42 U.S.C. § 1843.

In rebuttal, the defendants, Ed Montgomery and Charlie Sanders, clarify their claims for summary

judgment as failure to sufficiently allege jurisdiction and qualified immunity.[1] Charlie Sanders also claims that there is no liability under Section 1983 for mere co-workers.

Upon initial review, it appears that the plaintiff failed to specifically allege the basis for this court's jurisdiction over the subject matter of this cause in the complaint. According to the Federal Rules of Civil Procedure, all claims must contain the "grounds upon which the court's jurisdiction depends." FED. R. CIV. PRO. 8(a)(1). The plaintiff's complaint states that jurisdiction over the individual defendants is proper through "42 U.S.C. § 1843." The court takes notice that there is no 42 U.S.C. § 1843. The plaintiff claims that in addition to certain statements in the complaint apprizing the individual defendants of a 42 U.S.C. § 1983 claim, the complaint sufficiently alleged jurisdiction by reference to 28 U.S.C. § 1331. Further, the plaintiff made reference to 42 U.S.C. § 1983 in her opposition to the motions for summary judgment as being grounds for this court's jurisdiction over the individual defendants. Upon taking all of this under consideration, the court finds that the plaintiff sufficiently alleged jurisdiction over the individual defendants.

Both individual defendants further claim that even if the plaintiff fulfilled the pleading requirements with 42 U.S.C. § 1983 as the jurisdictional basis, they should be entitled to qualified immunity. Qualified immunity shields government officials performing discretionary functions from civil damage liability if their actions were objectively reasonable in light of clearly established law. Jones v. City of Jackson, 203 F.3d 875, 881 (5th Cir. 2000). The evaluation of a qualified immunity claim involves a two-step inquiry. Harris v. Victoria Ind. Sch. Dist.,168 F.3d 216, 223 (5th Cir. 1999). The first step is to determine whether the plaintiff has alleged a violation of a clearly established constitutional right. Harris, 168 F.3d at 223. The second step requires the court to determine whether the defendants' conduct was objectively reasonable under existing clearly established law. Id.

[1]Ed Montgomery subsequently filed a motion for qualified immunity and Charlie Sanders filed a second motion for summary judgment. Both of these motions basically set forth similar arguments as the arguments submitted in their rebuttal briefs in both of the separate motions for summary judgment. The court is considering all motions in this opinion.

If the law was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could the official fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Morris v. Dearborne, 181 F.3d 657, 665 (5th Cir. 1999). However, "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Morris, 181 F.3d at 665. "Further, the applicable law that binds the conduct of officeholders must be clearly established at the very moment that the allegedly actionable conduct was taken." Stem v. Ahearn, 908 F.2d 1, 5 (5th Cir. 1990).

The plaintiff's memorandum in opposition states that the Fifth Circuit has not addressed whether sexual harassment constituted a separate constitutional tort in the context of Section 1983 claims. The Fifth Circuit has directly addressed this issue of law finding that sexual harassment did constitute a separate constitutional tort in the context of Section 1983 claims. Southard v. Texas Bd. of Criminal Justice, 114 F.3d 539, 550 (5th Cir. 1997). The decision in Southard was handed down on June 13, 1997, thereby making it a clearly established constitutional right sexual harassment constituting a separate constitutional tort in the context of Section 1983 claims. All of Ed Montgomery and Charlie Sanders' alleged improper sexually harassing conduct occurred before June 13, 1997. Therefore, none of Ed Montgomery and Charlie Sanders' alleged inappropriate sexually harassing conduct violated any constitutional right that was clearly established at that time. Thus, the plaintiff has failed to establish a violation of a clearly established constitutional right.

Since the plaintiff was unable to successfully comply with the first step of the qualified immunity defense, no further discussion is necessary on the second step of whether the defendants' conduct was objectively reasonable. As such, the plaintiff has failed to allege violations of clearly established constitutional rights of which a reasonable person, in this jurisdiction, would have known. Therefore, the individual defendants, Ed Montgomery and Charlie Sanders, are entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, the court finds that Mississippi State University's motion to dismiss and/or for summary judgment should be granted in part and denied in part, and Ed Montgomery and Charlie Sanders' motions for summary judgment should be granted. An order will issue accordingly.

THIS, the ____ day of August, 2000.

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NEAL B. BIGGERS, JR.
CHIEF JUDGE